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In the Supreme Court of the United States

OCTOBER TERM, 1978

NEW YORK TELEPHONE COMPANY, ET AL.,
PETITIONERS

v.

NEW YORK STATE DEPARTMENT OF LABOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

The question presented in this case is whether the New York statute that provides unemployment compensation benefits to employees who are out of work because of "a strike, lockout, or other industrial controversy," N.Y. Labor Law § 592.1 (McKinney 1977), impermissibly interferes with the federal labor policy embodied in the National Labor Relations Act, 49 Stat. 449, as amended, 29 U.S.C. 151, *et seq.* (NLRA).

Since the proper resolution of this question turns on the intent of Congress in enacting two major statutory programs that are administered by federal agencies—the NLRA and Title IX of the Social Security Act of 1935, 49 Stat. 639 [1]—the United States has a substantial interest in this case.

In an earlier case presenting a similar challenge to the unemployment compensation statute of a different state, the United States submitted a memorandum as *amicus curiae* expressing the view that the payment of unemployment benefits to striking workers is not in conflict with federal labor law. *Kimbell, Inc.* v. *Employment Security Commission of New Mexico*, No. 75-1452, appeal dismissed for lack of a substantial federal question, 429 U.S. 804. The United States believes that the same conclusion is warranted with regard to the New York statute challenged in this case.

STATEMENT

On July 14, 1971, the Communications Workers of America, AFL-CIO (the "Union") commenced a nationwide strike against the Bell System in support of bargaining negotiations then in progress. On July 18, after an agreement was reached subject to employee ratification, the Union ordered all employees back to work. All employees returned to work except the approximately 38,000 employees represented by New York locals of the Union. These employees con-

[1] Title IX has been amended and recodified as the Federal Unemployment Tax Act, 68A Stat. 439, 26 U.S.C. 3301, *et seq.*

tinued on strike for an additional seven months (Pet. App. 5a-6a). After the strike had continued beyond the first eight weeks, the strikers became eligible for unemployment compensation benefits under the New York statute.[2] During the remaining five months of this strike, the striking employees received approximately $49,000,000 in benefits from the state's unemployment compensation funds (Pet. App. 24a).[3]

Petitioners then filed this action in the United States District Court for the Southern District of New York seeking, *inter alia*, a declaratory judgment that the New York statute, in providing for the payment of unemployment compensation to strikers, was contrary to the policy of federal labor law.[4] After a non-jury trial, the district court found that the state unemployment compensation benefits in fact influenced the willingness and ability of employees to continue the strike (Pet. App. 28a-38a). It further found that the employers' resolve to withstand the strike was affected by the fact that their unemployment insurance account was approaching

[2] N.Y. Labor Law § 592.1 permits employees who are out of work because of a "strike, lockout, or other industrial controversy" to collect unemployment compensation after a waiting period of eight weeks. The waiting period for those unemployed for other reasons is only one week.

[3] New York's unemployment insurance system is financed entirely by employer contributions (Pet. App. 6a).

[4] Petitioners also sought to recover payments made to the state's unemployment compensation fund and a restoration of the credits lost due to the payment of benefits to strikers (Pet. App. 24a).

a negative balance (Pet. App. 27a-28a). The court concluded that, by altering "the balance of power among competing forces," the New York law conflicts with the policy of free collective bargaining established in the federal labor laws (Pet. App. 42a, 43a). The court held that the state statute was therefor invalid under the Supremacy Clause of the United States Constitution (Pet. App. 54a) and issued an order enjoining enforcement of the New York statute "to the extent it provides for the payment of unemployment compensation to strikers" (Pet. App. 20a).

The court of appeals reversed. The court did not disturb the district court's finding that the New York law affected the balance of economic strength in the bargaining process. The court of appeals stated that "the crucial inquiry [is] whether Congress intended [this field to] be unregulated because [it was] left 'to be controlled by the free play of economic forces'" (Pet. App. 6a, quoting *Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 140). Disagreeing with courts that have found only "ambiguous" expressions of a congressional intent to permit the payment of unemployment benefits to strikers,[5] the court of appeals found that the evi-

[5] See *Grinnell Corp.* v. *Hackett*, 475 F.2d 449, 454-457 (C.A. 1), certiorari denied, 414 U.S. 858; *Hawaiian Telephone Co.* v. *Hawaii Department of Labor and Industrial Relations*, 405 F. Supp. 275, 286 (D. Hawaii), appeals docketed, C.A. 9, Nos. 76-1584, 76-2056, certiorari prior to judgment denied, No. 77-962, March 27, 1978.

dence of congressional intent "is not 'ambiguous' but is relatively one-sided" (Pet. App. 7a). Reviewing the legislative history of the NLRA, the Social Security Act of 1935, and other relevant legislation, the court concluded (Pet. App. 16a-17a):

> [T]he question whether striking employees should be afforded unemployment compensation has been a significant political issue since the early 1930s. In 1935, at a time when Congress sought to encourage the States to enact unemployment compensation statutes, New York was in the forefront, and its law granted compensation to strikers. For over forty years, Congress has been aware of the issue in general, and of New York's program in particular. * * * [A]nd despite the otherwise broad preemptive scope of the federal labor laws, Congress has not expressed an intent to preempt State unemployment compensation laws that provide benefits to strikers. Quite to the contrary, it has evinced an intention to leave the States free to regulate in this area. Therefore, the conflict between New York's statute and the broad federal policy of free collective bargaining does not render the State statute unconstitutional. The conflict is one which Congress has decided to tolerate.

ARGUMENT

THE NEW YORK STATUTE PROVIDING FOR THE PAYMENT OF UNEMPLOYMENT COMPENSATION TO STRIKERS IS NOT PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT

A. Introduction and summary

Under the New York unemployment compensation statute, striking workers who have been unable to obtain other employment are entitled to unemployment benefits after the expiration of an eight-week waiting period. The district court found that the availability of unemployment compensation to strikers under the New York law increased the ability of employees to carry on the strike and weakened the resolve of employers to withstand it.[6] On the basis of these express findings, we do not dispute the correctness of the district court's conclusion that the availability of unemployment compensation under the New York statute has altered the economic balance between the bargaining parties.

But this does not compel the further conclusion that the New York statute conflicts with, and is therefore precluded by, the federal labor law policy favor-

[6] In this respect, the case differs from *Kimbell, Inc.* v. *Employment Security Commission of New Mexico, supra.* In *Kimbell,* the state did not determine that strikers were eligible for benefits under the state unemployment compensation law until six months after the strike was over. The state benefits could thus not be said to have influenced the economic strength of the parties during the strike. See Memorandum for the United States as *Amicus Curiae* in *Kimbell, Inc.*, No. 75-1452, *supra,* pp. 9-10.

ing the "free play of economic forces." *National Labor Relations Board* v. *Nash-Finch Co.*, 404 U.S. 138, 144. Preemption is a doctrine designed to give effect to the congressional intent, and "[t]he purpose of Congress is the ultimate touchstone." *Malone* v. *White Motor Corp.*, No. 76-1184, decided April 3, 1978, slip op. 6; *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103. The determinative issue in this case is thus not whether the state law interferes with the otherwise free economic bargaining relationship between the parties, but whether the interference is permissible because it was within the contemplation of Congress. The essential inquiry is whether, in the precise context of unemployment benefits for striking workers, Congress "has occupied this field and closed it to state regulation." *Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132, 146, quoting *Teamsters Union* v. *Morton*, 377 U.S. 252, 258.

The legislative histories of the NLRA and of the Social Security Act of 1935—enacted within a month of each other[7]—indicate that Congress, though aware

[7] The NLRA was enacted on July 5, 1935, and the Social Security Act on August 14, 1935. The former was debated in the Senate on May 14-16, 1935, and in the House on June 19, 1935. The latter was debated in the House on April 11-19, 1935, and in the Senate on June 14, 15, 17-19, 1935. Senator Wagner was a member of the Senate Committee which proposed each Act.

Title IX of the Social Security Act (now recodified as the Federal Unemployment Tax Act, 68A Stat. 439, as amended, 26 U.S.C. 3301, *et seq.*) established the participatory federal unemployment compensation scheme.

of the possible effect that unemployment compensation to strikers would have on the collective bargaining process, concluded that a uniform policy on the payment of such benefits to strikers was not essential to the federal regulatory scheme and thus left the matter to the judgment of each state. Indeed, the New York statute, which antedated the federal law, was reviewed by Congress and cited as an example of a permissible state unemployment compensation scheme. Furthermore, since enactment of the NLRA and the Social Security Act in 1935, Congress has rejected legislative proposals that were expressly designed to deter or preclude the states from paying unemployment compensation benefits to strikers. The court of appeals was therefore correct in concluding that, although the New York statute may affect the balance of power in particular labor disputes, this effect is one that "Congress has decided to tolerate" (Pet. App. 17a).[8]

[8] We do not suggest, however, that Congress afforded the states a blank check to enact any unemployment compensation provision they desire without regard to the demands of national labor policy. For example, in *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, the Florida unemployment compensation law disqualified an individual for compensation for any week in which he was unemployed "due to a labor dispute in active progress which exists at the factory * * * at which he * * * was last employed." The Florida Industrial Commission interpreted this provision to mean that the mere filing of unfair labor practice charges with the NLRB, alleging that employment was terminated in violation of the NLRA, created a disqualifying "labor dispute" within the meaning of the statute. This Court held that the State's construction of its law conflicted with the federal labor policy prohibiting retaliation or coercion of individuals who file charges with the NLRB. The Court thus concluded that the regulation "stood 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 240, quoting *Hill* v. *Florida*, 325 U.S. 538, 542. The regulation involved in *Nash* could not be said to be within Congress' contemplation as appropriate state action when it enacted the Social Security Act in 1935. As we show *infra*, however, New York's grant of unemployment benefits to strikers was within the express contemplation of Congress, and is therefore no "obstacle" to the effectuation of federal labor policy.

B. The legislative history of the Social Security Act of 1935 shows that Congress was aware that unemployment compensation for strikers would affect the relative bargaining strengths of employers and employees but left the matter to the judgment of each state

1. The Social Security Act of 1935 was enacted against a backdrop of massive unemployment. A primary concern of Congress in enacting the unemployment compensation provisions in Title IX of the Act was to ameliorate the adverse social and economic effects of this substantial involuntary unemployment. See H.R. Rep. No. 615, 74th Cong., 1st Sess. 8 (1935); S. Rep. No. 628, 74th Cong., 1st Sess. 11 (1935). However, Congress also focused sharply on the need to protect the freedom of choice for each state in determining the balance to be struck in the distribution of economic benefits and burdens under the unemployment compensation system. The Senate Report stated that (S. Rep. No. 628, *supra*, at 13-14):[9]

> Except for a few standards which are necessary to render certain that the State unemployment

[9] See also H.R. Rep. No. 615, *supra*, at 8-9.

compensation laws are genuine unemployment compensation acts and not merely relief measures, the States are left free to set up any unemployment compensation system they wish, without dictation from Washington. The States may or may not add employee contributions to those required from the employers. * * * Likewise, the States may determine their own compensation rates, waiting periods, and maximum duration of benefits. Such latitude is very essential because the rate of unemployment varies greatly in different States, being twice as great in some States as in others.

Under the bill, as we recommend that it be amended, the States will also have freedom of choice with regard to the type of unemployment compensation law they wish to enact. Three different types are represented in the five laws thus far enacted. In the New York and the Washington laws, there is a pooled unemployment insurance fund, in which all contributions are commingled and from which payments of compensation are made to unemployed workmen without reference to the employer for whom they work.

Utah and Wisconsin have unemployment compensation laws of the individual employer account type. In these laws the contributions of each employer are segregated, and payments of compensation therefrom are made only to workmen of these particular employers who become involuntarily unemployed. * * *

There are good arguments to be made in favor of each of these types of unemployment compensation laws. In accordance with the entire spirit of the Social Security Act, we believe that the Federal Government should not attempt to dictate to the States which type of unemployment

compensation law they should adopt. The amendment we suggest to the House bill will eliminate all such dictation and leave the States free to decide for themselves which type best suits their peculiar conditions.

The New York statute that was referred to and approved in the committee report provided for the payment of unemployment compensation to strikers.[10] Although the committee report does not refer to this specific feature of the New York law, and instead refers generally to the "freedom of choice" that is reserved for the states in enacting unemployment compensation laws (S. Rep. No. 628, *supra*, at 13), there is warrant for the assumption that Congress intended to allow the states freedom to experiment in the provision of such benefits to strikers. As the First Circuit noted in *Grinnell Corp.* v. *Hackett*, *supra*, 475 F.2d at 454:[11]

> In July 1933, the Federal Emergency Relief Administration (FERA) ruled that it would not

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[10] The other four state laws discussed in the Senate Report denied unemployment benefits to striking employees.

[11] In *Grinnell*, the First Circuit agreed that the legislative history of the Social Security Act could be understood "as indicating a broad Congressional intent not to preempt payments to strikers * * *." 475 F.2d at 457. The court found the congressional intent in this regard, however, to be less than "unambiguous." *Ibid.* The court therefore concluded that a congressional intent to protect the states' freedom of choice in the payment of unemployment benefits to strikers should not be implied. *Ibid.* But there is no reason to alter ordinary principles of statutory construction in determining whether Congress intended to permit the states to act independently in this case. If the congressional intent can be discerned, there is no basis for ignoring it because it is not "unambiguous."

> "attempt to judge the merits of labor disputes" but would treat unemployed strikers like all other unemployed persons for purposes of relief. Brown, Public Relief 1929-39, 270 (1940). This policy became a bone of contention during the textile strike of September 1934. Bernstein, The Turbulent Years: A History of the American Worker, 1933-41, 307 (1971).[12] Congress could hardly have been unaware of this policy when in 1935 it passed in close succession both the National Labor Relations Act, * * * and the Social Security Act, * * * Title IX of which * * * is now the Federal Unemployment Tax Act * * *.

Moreover, the Advisory Council to the Committee on Economic Security recommended to Congress that the "unemployment of persons directly engaged in trade disputes" not be covered under the unemployment

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[12] Bernstein recorded the events that occurred in 1934 (*id.* at 307-308):

> * * * [N]ewspapers across the nation announced that the federal government would underwrite the textile strike by giving relief to those who walked out. * * * The Illinois Manufacturers Association wrote [FERA Administrator] Hopkins through the newspapers that his policy imposed "an undue and indefensible burden upon . . . taxpayers" and was an invitation to "organized minorities" to "universal promotion of industrial warfare." H. H. Swift, a Columbus, Georgia, attorney representing textile interests, wrote the President that "the strike would never have been called . . . without the . . . financial support from the Federal Government." * * * Secretary of Commerce Roper, returning from a meeting of businessmen in Birmingham, reported great concern over federal feeding of strikers. He suggested with true southern gallantry that the President turn this question over to the States.

compensation provisions of the Social Security Act.[13] Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess. 228 (1935); Hearings on H.R. 4120 before the House Committee on Ways and Means, 74th Cong., 1st Sess. 871, 885 (1935). Similar proposals were made by the American Association for Social Security and the National Association of Manufacturers. Hearings on S. 1130, *supra*, at 472, 959. Congress, however, chose not to impose any federal restrictions on the payment of unemployment compensation to striking employees. Instead, it followed the recommendation of the Report of the Committee on Economic Security that, since "considerable controversy has developed over the type of unemployment compensation legislation that should be enacted," including "the type of unemployment to be benefited," it was desirable to permit "considerable variation, so that we may learn through demonstration what is best."[14] Report of the Committee on Economic Security, Hearings on S.

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[13] By Executive Order No. 6757, June 29, 1934, President Roosevelt established the Committee on Economic Security, consisting of the Secretary of the Treasury, Attorney General, Secretary of Agriculture, Secretary of Labor, and the Federal Emergency Relief Administrator. Also established was an Advisory Council, whose members were to be appointed by the President. Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess. 224-225 (1935).

[14] In *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 130, this Court recognized that the "Social Security Act received its impetus from the Report of the Committee on Economic Security * * *."

1130, *supra*, at 1323. The legislation ultimately adopted by Congress is thus intended to permit "variations in State laws but insures uniformity in respects in which uniformity is absolutely essential." *Ibid.*

Consistent with this intent, Section 903(a) of the Act, 49 Stat. 640, provided that a state unemployment compensation law must meet only six specific requirements to qualify under the federal scheme.[15] The one requirement that relates to benefit eligibility [16] provides that

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[15] The Executive Director of the Committee on Economic Security explained that the

> Federal Act leaves to the decision of the states all questions relating to contributions and benefits; in fact, practically everything that is customarily included in unemployment compensation laws.
>
> There are, indeed, in Section 903(a), six conditions to which state laws must conform in order to be recognized for tax credit purposes under Title IX. These conditions, however, are, in the main, merely definitions of a genuine unemployment compensation act, not an attempt to secure uniformity throughout the country.

Witte, *An Historical Account of Unemployment Insurance in the Social Security Act*, 3 Law & Contemp. Prob. 157, 169 (1936).

[16] The other requirements for approval of the state plan were (i) that unemployment compensation must be paid through public employment offices in the state, (ii) that no compensation be paid with respect to unemployment occurring before the expiration of a two-year contribution period, (iii) that all money paid into the state unemployment fund promptly be paid over to the Secretary of the Treasury, (iv) that all money withdrawn from the unemployment trust fund by a state agency be used solely in the payment of compensation, and (v) that the state law provide that any rights,

> [c]ompensation shall not be denied * * * to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization * * *. [Section 903(a)(5) of the Act; 26 U.S.C. 3304(a)(5).]

Congress adopted these eligibility conditions for the very purpose of insuring "the compatibility of state unemployment compensation laws with the then brand-new labor statute." *Grinnell Corp.* v. *Hackett*, *supra*, 475 F.2d at 454-455. See Burns, *Unemployment Compensation and Socio-Economic Objectives*, 55 Yale L.J. 1, 17 n. 49 (1945).

Moreover, as the court of appeals noted (Pet. App. 12a-13a), the Social Security Board was empowered to review state unemployment compensation plans and to determine whether they were consistent with the conditions set forth in Title IX of the Social Security Act. Section 903(b) of the Act, 49 Stat. 640. The Board approved the New York unemployment compensation plan and the plans of three other

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privileges, or immunities conferred under it shall exist subject to the power of the legislature to amend or repeal the law at any time. Section 903(a)(1), (2), (3), (4), (6), 49 Stat. 640.

states also authorizing the payment of benefits to strikers. The Secretary of Labor, who is now responsible for certifying state laws on an annual basis, has consistently approved the New York law (Pet. App. 12a-13a). This consistent course of administrative conduct by the federal officials responsible for administration of the Social Security Act is entitled to great deference (see, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16; *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210).[17]

Accordingly, in *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 488-489, after reviewing the legislative history of the Social Security Act and the Act's specific eligibility conditions for benefits, the Court concluded that Congress intended to leave the states free to legislate on the subject of unemployment compensation for strikers. In *Hodory*, the Court rejected the claim that, in enacting the Social Security Act, Congress had intended to require the states to pay unemployment compensation to workers involuntarily unemployed due to labor disputes. The Court stated (431 U.S. at 488-489; footnotes omitted):

> [W]hen Congress wished to impose or forbid a condition for compensation, it was able to do so in explicit terms. * * * The fact that Congress has chosen not to legislate on the subject of

[17] While not dispositive with respect to questions under the NLRA, this settled administrative practice under the Social Security Act is inconsistent with petitioners' contentions under that Act (discussed above and at pp. 17-22, *infra*).

> labor dispute disqualifications [for unemployment compensation benefits] confirms our belief that neither the Social Security Act nor the Federal Unemployment Tax Act was intended to restrict the States' freedom to legislate in this area.

Since, in adopting the specific eligibility conditions in Title IX of the Social Security Act, Congress made a considered choice not to "impose or forbid" a requirement that states are not preempted but are left free "to legislate in this area." *Ibid.*

2. Nor is there merit in petitioners' contention (Br. 46-47) that, even if Congress did not expressly exclude strikers from eligibility for benefits, its intent in that regard may be assumed from the focus of the legislation on the problem of involuntary unemployment. While a primary concern of the unemployment compensation provisions of the Social Security Act was the needs of "workmen who lose their positions when employment slackens" (S. Rep. No. 628, *supra*, at 11), Congress did not adopt the suggestion of the Advisory Council that eligibility for benefits be restricted to the involuntarily unemployed. See p. 12, *supra*.[18] Rather, for the reasons expressed in

[18] State laws vary considerably in providing benefit eligibility for persons who quit their jobs voluntarily or are discharged for cause. Some states provide benefits without qualification while others deny, delay, or reduce benefits. See United States Department of Labor, *Comparison of State Unemployment Compensation Laws*, Table 401, 4-27, Table 402, 4-31 (January 1978).

The Senate Report states in passing that "[p]ayment of compensation is conditioned upon continued involuntary unem-

Hodory, supra, 431 U.S. at 488-489, this was another matter that was left to the judgment of the states.[19] See also *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 518-519 (upholding the Alabama unemployment compensation scheme that extended benefits to persons other than the involuntarily unemployed).

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ployment." S. Rep. No. 628, *supra*, at 11. *Amici* Dow Chemical, *et al.*, assert (Br. 24) that "[t]he underlying assumption was that a worker would take available work * * *." Under the New York law, however, strikers must be available for and accept suitable employment if offered. Contrary to *amici's* assumption, strikers are not unavailable for employment merely because they are on strike. Many strikers seek and accept interim employment during a strike. Section 903(a)(5)(A) of the Act, however, makes clear that the states may not deny eligibility to a worker who refuses to accept a position that "is vacant due directly to a strike, lockout, or other labor dispute." 26 U.S.C. 3304(a)(5)(A).

[19] *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, does not require a different conclusion. There the Court struck down a provision of the California unemployment compensation law that withheld benefits pending appeals of eligibility determinations. The Court concluded that the State provision violated the express command of the federal law requiring that unemployment compensation be paid when due. *Id.* at 129-130, 135. In so concluding, the Court stated: "The objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee." *Id.* at 130. However, the Court also noted that Congress viewed unemployment compensation as a means of maintaining purchasing power and of minimizing the necessity for welfare payments. *Id.* at 131-132. Whatever Congress' objectives may have been in enacting the Social Security Act, it did not consider it necessary, in order to accomplish those objectives, to require the states to limit their unemployment systems to the involuntarily unemployed.

Petitioners also claim (Br. 48) that the model state laws drafted by the Social Security Board in 1936 contained a provision which "expressly denied benefits to strikers." They contend that this provision reflected a congressional intent that strikers not be eligible for unemployment benefits. The Draft Bills, however, were

> merely suggestive and * * * intended to present the various alternatives that may be considered in the drafting of state unemployment compensation acts. Therefore, they cannot properly be termed "model" bills or even recommended bills. This is in keeping with the policy of the Social Security Board of recognizing that it is the final responsibility and the right of each state to determine for itself just what type of legislation it desires and how it shall be drafted.

Draft Bills for State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types, Social Security Board, Washington, D.C. (January 1936).[20] In any event, the Draft Bills did not expressly deny benefits to strikers. Rather, they included a provision modelled on the British Unemployment Insurance Act that disqualified an individual unemployed as the result of a labor dispute that has caused a "stoppage of work." This term is interpreted by British decisions and by a majority of the states to mean a curtailment of work at the employ-

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[20] See also *Ohio Bureau of Employment Services* v. *Hodory*, *supra*, 431 U.S. at 485, where the Court stated that it was "most reluctant" to give the Draft Bills any weight in construing the Social Security Act.

ing enterprise and not a cessation of work by individual employees. Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U. Chi. L. Rev. 294, 308 (1950); Annot., *Unemployment Benefits—"Stoppage of Work,"* 61 A.L.R. 3d 693, 697-704, 705 (1975). See Hughes, *Principles Underlying Labor-Dispute Disqualification*, Attachment to Unemployment Compensation Program Letter No. 000, Social Security Administration, p. 26 (July 1946). Accordingly, even under the Draft Bills a striker could obtain unemployment compensation if the strike did not result in a substantial curtailment of the employer's operations.

Petitioners further contend (Br. 50) that, even if Congress were aware of and approved the benefit provisions of the New York unemployment compensation statute in 1935, Congress could not have contemplated the impact that the New York payments currently have on the collective bargaining process. Petitioners rely particularly on the fact that New York's experience rating system [21] was not in ex-

[21] The Act allows an employer a credit against the federal unemployment compensation tax if the state has lowered the employer's contribution rate on the basis of not less than three years of "experience with respect to unemployment or other factors bearing a direct relation to unemployment risk." 26 U.S.C. 3303(a). All of the currently existing state unemployment compensation laws have some type of experience rating system. The New York system, which employs a "reserve-ratio" formula, is similar to those in 31 other states. *Comparison of State Laws, supra*, note 18, pp. 2-4, 2-5, sec. 220.01. The reserve ratio formula seeks to maintain an even balance between payments made into the fund by the employer and benefits paid out of the fund to the employer's workers (see Pet. App. 6a, 27a-28a).

istence in 1935 and that the rating system has substantially increased the economic leverage that unemployment compensation gives to striking workers (Br. 50-51). Petitioners have overlooked the fact, however, that the Social Security Act included a provision designed to encourage states to adopt experience rating systems. See 26 U.S.C. 3302(b); S. Rep. No. 628, *supra*, at 14. The State's adoption of such a system was therefore plainly within congressional contemplation in 1935. See also *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 365.[22]

Finally, there is no merit in petitioners' contention (Br. 48-49) that a congressional intent to preclude the states from paying unemployment benefits to strikers is evidenced by the fact that, in enacting an unemployment compensation statute for the District of Columbia in 1935, Congress made striking workers ineligible for these benefits.[23] In enacting the District of Columbia law, Congress was acting in a capacity similar to that of a state legislature. It does not follow from the choice made by Congress in its capacity as a local lawmaker that Congress in-

[22] Petitioners also point out (Br. 50) that the initial waiting period for strikers under the New York law was 10 weeks instead of eight weeks, and that both the amount of benefits and their duration have increased. However, these changes merely reflect the fact that wages and living costs have increased since 1935. They do not alter the basic scheme of the New York unemployment compensation system.

[23] The District of Columbia Unemployment Compensation Act, 49 Stat. 946, as amended, 46 D.C. Code 301, *et seq.*, denies benefits to any individual unemployed as a result of a "labor dispute still in active progress." 46 D.C. Code 310(f).

tended to mandate the same policy judgment for each of the states. On the contrary, as we have shown above, Congress considered it appropriate to leave the states free to address the difficult substantive question whether, in the context of each state's needs and judgment, unemployment benefits should be provided to striking workers.

C. The intent of Congress to permit each state to determine whether strikers should receive unemployment compensation is confirmed by the history of subsequent legislation

Following the enactment of the NLRA and the Social Security Act in 1935, Congress has considered and rejected legislative proposals that would have deterred or precluded the states from paying unemployment compensation to strikers. In 1947, the Hartley Bill was passed by the House; it provided that a striker who accepted unemployment compensation would no longer be considered an "employee" under the National Labor Relations Act (H.R. 3020, 80th Cong., 1st Sess., Section 2(3) (1947)), and thus would lose all rights under that Act. The House Report indicates that this provision of the Hartley Bill was motivated by the concern that the payment of unemployment compensation to strikers was "a perversion of the purposes of the social security laws." H.R. Rep. No. 245, 80th Cong., 1st Sess. 12 (1947). The Minority Report, however, stated that "[u]nder the Social Security Act * * * the determination of these matters was advisedly left to the States." *Id.* at 68. The Senate version of the legislation omitted

this provision of the Hartley Bill, and the Senate version was accepted in conference without explanation. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 32-33 (1947).

In 1969, the House rejected President Nixon's proposal that strikers be excluded from eligibility for unemployment compensation. House Committee Chairman Wilbur Mills explained:

> We have tried to keep from prohibiting the States from doing the things the States believe are in the best interest of their people. * * *
>
> For example, there are two States * * * which will pay unemployment benefits when employees are on strike * * *. * * * [I]f the State wants to do it we believe they ought to be given latitude to enable them to write the program they want. [115 Cong. Rec. 34106 (1969).][24]

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[24] When Congress has chosen to set federal standards governing the availability of benefits for strikers, it has done so expressly. The Railroad Unemployment Insurance Act (52 Stat. 1094, as amended, 45 U.S.C. 351, *et seq.*) provides that only participants in unlawful strikes may be denied unemployment benefits under that Act. 45 U.S.C. 354(a-2) (iii). Congress amended the Food Stamp Act in 1971 (84 Stat. 2049) to prohibit states from denying food stamps to strikers. 7 U.S.C. 2014(c). In doing so, Congress rejected the proposal that such aid be denied to strikers because it did not want "to take sides in labor disputes." H.R. Rep. No. 91-1402, 91st Cong., 2d Sess. 11 (1970). On the other hand, Congress has left the states free to determine whether benefits under the Aid to Families with Dependent Children Program, 42 U.S.C. 606, may be denied to the children of participants in a labor dispute. *Batterton* v. *Francis*, 432 U.S. 416. See also *Super Tire Engineering Co.* v. *McCorkle*, 550 F.2d 903 (C.A. 3), certiorari denied, 434 U.S. 827, in which the court rejected the contention

Petitioners (Br. 53) cite the maxim that the views of a subsequent Congress have little relevance to the determination of the intent of an earlier Congress. However, as the Court noted in *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 365-366, the action or inaction of a subsequent Congress is relevant to the question whether Congress is satisfied that a law is being properly interpreted and applied. This is particularly true with regard to the Social Security Act. The unemployment compensation system recommended by the Committee on Economic Security and adopted by Congress was designed to promote experimentation in almost every regard by the states. See p. 13, *supra*. The Committee was aware, however, that the freedom afforded the states could lead to results that Congress might ultimately disapprove. It therefore suggested that (Hearings on S. 1130, *supra*, at 1323):

> [s]hould these fears expressed by the champions of a federally administered system prove true, it is always possible by subsequent legislation to establish such a system. We recommend that it be expressly provided in the Federal act that all States must include in their statutes provisions to the effect that those acts shall not be deemed to create any vested interests preventing modification or repeal and that a similar reservation of power be made by the Federal Government. Accordingly, the Congress can at any time increase the requirements which State laws must fulfill and may, if it sees fit, at some future time, substitute a federally administered system for the cooperative Federal-State system we recommend.

Congress adopted this recommendation by enacting Section 903(a)(6) of the Act, 49 Stat. 640, which provided that "[a]ll the rights, privileges, or immunities conferred by such law or by acts done pursuant thereto shall exist subject to the power of the legislature to amend or repeal such law at any time." It is therefore reasonable to conclude, as Representative Mills has confirmed, that when Congress rejected the proposals to deter or preclude the states from providing unemployment compensation to strikers, Congress was expressing an affirmative intent that the states are to remain free to exercise their independent judgment on this complex matter of social policy.[25]

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that New Jersey's policy of paying welfare benefits to strikers was in conflict with national labor policy.

[25] It is unnecessary to determine in this case the ultimate scope of the states' freedom to make payments to strikers that may intrude on or disrupt the collective bargaining process. See note 8, *supra*. For example, a statute requiring an employer to pay its employees—through the state unemployment compensation system—100 percent of wages from the beginning of a strike to the end would appear to be so far beyond the focus of the Social Security Act and so destructive of the principles of the NLRA as to be beyond the contemplation of Congress in permitting some freedom of choice to the states. The New York statute, however, is clearly not in this category.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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